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No. 90-107

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY and KAY STEWART - - - - - - - - Petitioners

versus

F.T.P., the Real Party in Interest, and HONORABLE ROBERT E. DELAHANTY, Jefferson District Court Judge - - Respondents

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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QUESTION PRESENTED FOR REVIEW

Does the First Amendment to the United States Constitution prohibit the mandatory closure of juvenile court delinquency hearings and records, which relate to a constitutional challenge to a state statute, where the closure occurs without any consideration of the interests allegedly advanced by closure or the availability of more narrowly tailored alternatives to closure?

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

Petitioners, Courier-Journal and Louisville Times Company[1] and Kay Stewart, pray that a writ of certiorari issue to review the decision and order of the Court of Appeals of Kentucky.

OPINIONS BELOW

The opinion and order of the Court of Appeals of Kentucky was not reported but is printed in the Ap-

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[1]In compliance with Supreme Court Rule 29.1, Petitioners state that Gannett Co., Inc. is the parent company of Petitioner, Courier-Journal and Louisville Times Company, which has no subsidiary companies. In compliance with Supreme Court Rule 14.1(b), Petitioners state that there are no parties other than those stated in the caption.

pendix at 1a. The order of the Supreme Court of Kentucky denying discretionary review was not reported but is printed in the Appendix at 8a. An opinion of the Supreme Court of Kentucky in a related case, *F.T.P., an Unnamed Child v. Courier-Journal and Louisville Times Company,* upon which the Court of Appeals relied in the decision sought to be reviewed, was reported at 774 S.W.2d 444 and is printed in the Appendix at 9a.

JURISDICTION

The decision sought to be reviewed was issued by the Court of Appeals of Kentucky on October 27, 1989. On April 18, 1990, the Supreme Court of Kentucky entered an order denying discretionary review of the Court of Appeals decision. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment 14, Section 1:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

> deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Kentucky Revised Statutes 610.070(3):

> The general public shall be excluded and only the immediate families or guardians of the parties before the court, witnesses necessary for the prosecution and defense of the case, the probation worker with direct interest in the case, such persons admitted as the judge shall find have a direct interest in the case or in the work of the court, and such other persons as agreed to by the child and his attorney may be admitted to the hearing. Witnesses shall be admitted to the hearing only for the duration of their testimony.

Kentucky Revised Statutes 610.340(1):

> Unless a specific provision of KRS Chapters 600 to 645 specifies otherwise, all juvenile court records of any nature generated pursuant to KRS Chapters 600 to 645 by any agency or instrumentality, public or private, shall be deemed to be confidential and shall not be disclosed except to the child or parent unless ordered by the court for good cause.

STATEMENT OF THE CASE

This action poses the question of whether legal arguments regarding the constitutionality of a Kentucky statute may be conducted in a secret court proceeding, closed to the press and public, without any consideration of the need for closure or reasonable alternatives to it. The arguments were made in a juvenile

court in Jefferson County, Kentucky, in a case in which the Commonwealth of Kentucky alleged that a 16-year-old, F.T.P., while under the custody, care and control of the State, bludgeoned to death another juvenile who resided in the same State-run facility as F.T.P.

Kentucky's juvenile courts have exclusive jurisdiction in proceedings against individuals charged with public offenses (felony, misdemeanor or violation), who are under the age of 18 when the offense is committed. Ky. Rev. Stat. 610.010 (a). After F.T.P. was charged, the Commonwealth moved the juvenile court to transfer the charges against him to circuit court in order to try F.T.P. as an adult, pursuant to the transfer statute then in effect in Kentucky, Ky. Rev. Stat. 640.010. In response to that motion, F.T.P. moved to declare the transfer statute unconstitutional, presumably pursuant to this Court's decision in *Kent v. United States*, 383 U.S. 541 (1966), and its progeny.

The case received widespread publicity. At a hearing in juvenile court on January 4, 1988, counsel for F.T.P. conceded that his client's identity had been revealed in press reports about the incident.

> There has already been both [sic] pictures of my client that have been shown on the news. There's already been release of my client's mother's name and, therefore, the connection from that would be to get the child's name.

At the January 4, 1988 hearing, after oral arguments were held on the motion to declare the transfer statute unconstitutional but before the juvenile court ruled

on it, Petitioners, Courier-Journal and Louisville Times Company and Kay Stewart, a staff writer for the newspaper published by the corporation (hereinafter collectively referred to as "The Courier-Journal"), moved the juvenile court for access to the tapes or transcripts of all arguments, unrelated to the facts of the juvenile case, concerning the motion.

On January 22, 1988, the juvenile court declared the transfer statute unconstitutional. On the same day, the juvenile court denied The Courier-Journal's motion for access to the tapes or transcripts of the arguments on the motion. Although the juvenile court entered an opinion outlining its reasons for denying related motions made by The Courier-Journal[2], the opinion made no mention of the motion for access to the tapes or transcripts of the oral arguments, and no reason for denying the motion was given.

On March 31, 1988, The Courier-Journal filed a petition for declaratory and injunctive relief in the nature of prohibition or mandamus in circuit court, the court which has immediate appellate jurisdiction over the juvenile court. The petition sought access to the tapes or transcripts of the arguments on the con-

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[2]The juvenile court had ordered a State agency to deny The Courier-Journal access to the agency's investigative report on the death at the State-run group home, and refused to rescind the order when moved to do so by The Courier-Journal. A circuit court ordered the report released, after The Courier-Journal sought a writ of prohibition against the juvenile court judge. The juvenile court also denied access to the tapes or transcripts of a proceeding in which a prosecutor and F.T.P.'s mother were held in contempt of court for discussing the charges against F.T.P. The circuit court also found that decision to be in error, and ordered the transcript released to the press and public.

stitutionality of the transfer statute, along with access to other documents and proceedings. After F.T.P. indicated that he would argue the denial of access to the arguments was required by Ky. Rev. Stat. 610.070(3) and 610.340(1), The Courier-Journal served the Attorney General of Kentucky with copies of The Courier-Journal's petition and F.T.P.'s answer and memorandum.[3] The notice delivered to the Attorney General advised that, to the extent that Ky. Rev. Stat. 610.070(3) and 610.340(1) require the exclusion of the press and public from legal arguments relating to the constitutionality of a Kentucky statute, those sections of the juvenile code are invalid as violative of the United States and Kentucky Constitutions.

On June 15, 1988, the circuit court entered findings of fact, conclusions of law and an order refusing to issue a writ under which The Courier-Journal would have access to the tapes or transcripts of the legal arguments on the constitutionality of the transfer statute. Both The Courier-Journal and F.T.P. appealed portions of the circuit court order to the Court of Appeals of Kentucky.

Meanwhile, the juvenile court's order holding the transfer statute unconstitutional was appealed to the circuit court by the Commonwealth. When The Courier-Journal was denied access to the record and hear-

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[3]A Kentucky statute, Ky. Rev. Stat. 418.075, and a Kentucky Rule of Civil Procedure, CR 24.03, require notice to the Attorney General when the constitutionality of a statute is being challenged. The Courier-Journal raised its constitutional challenge and notified the Attorney General at the earliest possible date.

ings in the circuit court appeal, The Courier-Journal filed an original action in the Court of Appeals of Kentucky, seeking a writ prohibiting the closure of the circuit court proceedings. The Courier-Journal did not challenge the constitutionality of the juvenile court closure statutes in that original action, because it believed that those statutes, by their very terms, did not apply to circuit court appeals of juvenile court decisions.

On February 3, 1989, the Court of Appeals of Kentucky issued a writ, prohibiting the circuit court from excluding The Courier-Journal from hearings in the circuit court appeal and from closing the circuit court record, with the exception of any portions of the juvenile court record contained therein. F.T.P. and The Courier-Journal took an appeal and cross-appeal, respectively, to the Supreme Court of Kentucky.

On June 8, 1989, the Supreme Court of Kentucky held that the entire circuit court record, and all future proceedings in the case, would be closed to the press and public. The Court relied on the closure statutes, Ky. Rev. Stat. 610.070(3) and 610.340(1), and specifically noted that the constitutionality of those statutes was not an issue before the Court. *F.T.P. v. Courier-Journal and Louisville Times Company,* 774 S.W.2d 444, 446 (1989) (Appendix at 11a). Because The Courier-Journal believed that Ky. Rev. Stat. 610.070(3) and 610.340(1) were not related to the issue of closure of circuit court proceedings, it "did not

challenge the constitutionality of the closure statutes," and the constitutionality of those statutes was neither briefed nor argued to the Kentucky Supreme Court. 774 S.W.2d at 446 (Appendix at 11a). Nevertheless, that Court stated that the closure of the proceedings involving F.T.P. "does not violate or do violence to either the federal or the state constitution." 774 S.W.2d at 446 (Appendix at 13a). On September 7, 1989, the Supreme Court of Kentucky denied The Courier-Journal's petition for rehearing.

While the case involving access to the circuit court proceedings, in which the constitutionality of the closure statutes was not an issue, was proceeding in the Supreme Court of Kentucky on an advanced schedule, the case involving access to the tapes or transcripts of the juvenile court arguments, in which the constitutionality of the closure statutes was squarely at issue, was proceeding on a regular schedule in the Kentucky Court of Appeals. On September 12, 1989, the Court of Appeals heard oral argument in the case now sought to be reviewed. At the oral argument, the Court of Appeals was informed of the Kentucky Supreme Court's opinion in *F.T.P. v. Courier-Journal, supra,* which became final five days earlier.

On October 27, 1989, the Court of Appeals of Kentucky affirmed the decision denying The Courier-Journal access to the juvenile court arguments on the constitutionality of the transfer statute, with two of the three members of the panel reluctantly concluding that

the Kentucky Supreme Court's decision in *F.T.P. v. Courier-Journal, supra,* was controlling. *Courier-Journal and Louisville Times Company v. F.T.P.,* Court of Appeals Nos. 88-CA-1489-MR and 88-CA-1490-MR (October 27, 1989) (Appendix at 1a). The Court of Appeals majority opinion noted that the constitutionality of the closure statutes was not before the Kentucky Supreme Court in *F.T.P. v. Courier-Journal.* Moreover, the majority called some of the constitutional arguments raised by The Courier-Journal "quite persuasive" and urged the Supreme Court of Kentucky to consider them on discretionary review.

> We would urge the Supreme Court to grant a petition for review, if one is requested in this case, and to consider the constitutional questions with the benefit of briefs and arguments. We also point the Supreme Court's attention to the reasoning in the dissent filed herein by Judge Hayes.

Appendix at 3a. Judge Hayes' dissent, which the majority urged the Kentucky Supreme Court to consider, unequivocally concluded that the closure statutes are unconstitutional, if they are interpreted as mandatory bars to juvenile court access (Appendix at 5a). Judge Hayes cited two decisions by this Court (Appendix at 4a-5a).

The Courier-Journal moved the Supreme Court of Kentucky to review the Court of Appeals decision. On April 18, 1990, the Kentucky Supreme Court denied discretionary review, and ordered that the Court of Appeals decision not be published (Appendix at 8a). The Courier-Journal now seeks a writ of certiorari to review the decision of the Kentucky Court of Appeals.

THE REASONS FOR GRANTING THE WRIT

KENTUCKY REVISED STATUTES 610.070(3) AND 610.340(1), AS CONSTRUED BY THE KENTUCKY COURT OF APPEALS, VIOLATE THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT.

A. The First Amendment Right to Attend Judicial Proceedings Requires that Such Proceedings Be Open in Their Entirety Unless Closure, in Whole or in Part, Represents the Least Drastic Means of Achieving an Overriding Governmental Interest.

The question presented by this petition requires the attention of this Court in order to ensure that rights guaranteed by the First and Fourteenth Amendments to the United States Constitution are not compromised by failure to comply with the principles of law this Court announced in *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980), *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596 (1982), *Press Enterprise Co. v. Superior Court,* 464 U.S. 501 (1984) (*"Press Enterprise I"*), and *Press Enterprise Co. v. Superior Court,* 478 U.S. 1 (1986) (*"Press Enterprise II"*), and their progeny. Kentucky's juvenile court closure statutes have been interpreted by the Kentucky courts to require a "shroud of secrecy and confidentiality" — i.e., the *mandatory* closure of all juvenile court hearings and records. *F.T.P. v. Courier-Journal, supra,* 774 S.W.2d at 446 (Appendix at 12a). Under the case sought to be reviewed, juvenile courts in Kentucky are not required, or even allowed, to consider closure on a case-by-case basis, inquiring into the existence

and intensity of interests supporting closure, and considering alternatives less burdensome on First Amendment rights than closure itself. Instead, "the shroud of secrecy and confidentiality [is] mandated by the above-cited statutes. . . ." *Id.* The Kentucky Court of Appeals decision is thus contrary to decisions of this Court and other state and federal courts.

This Court's decision in *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980), made explicit for the first time that the First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, embodies a right on the part of the press and the general public to attend judicial proceedings. *Richmond Newspapers* involved the fourth trial of a criminal defendant on murder charges stemming from the 1975 stabbing death of a hotel manager. Before the trial began, counsel for the defendant moved that it be closed to the public. The prosecution did not object and the trial judge, exercising the discretion he thought was conferred upon him by a Virginia statute, ordered the courtroom closed to all parties except witnesses during the course of their testimony. Richmond Newspapers moved to vacate the closure order and that motion was denied in a closed hearing. The trial of the criminal case proceeded in a closed courtroom until the trial judge entered a finding of "not guilty" at the conclusion of the prosecution's case. Thereafter, the newspaper filed petitions for writs of mandamus and prohibition and

an appeal from the trial court's closure order, all of which were denied by the Virginia Supreme Court. The newspaper then filed an appeal with this Court.

In what was described by Justice Stevens as a "watershed case," 448 U.S. at 582 (Stevens, J., concurring), this Court reversed the judgment of the Virginia Supreme Court. Although no single opinion was adopted by a majority of the Court, the basic theme to which all but one of the members of this Court subscribed was that

> the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and "of the press could be eviscerated."

Richmond Newspapers, supra, 448 U.S. at 580 (plurality opinion), *quoting, Branzburg v. Hayes,* 408 U.S. 665, 681 (1972).

To be sure, none of the opinions rendered in *Richmond Newspapers* stated that the First Amendment right of access was absolute. The plurality opinion did indicate, however, that the standard for closure should be very high, and that the decision to close trials should be made by the trial judge on a case-by-case basis. Thus, as the plurality opinion put it, "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." *Richmond Newspapers, supra,* 448 U.S. at 581. Several of the concurring opinions also cited the very limited circumstances under which closure was

appropriate. Justice Stewart, for example, suggested that a court could order closure only when, and to the degree, necessary to maintain order in the courtroom, "[j]ust as a legislature may impose reasonable, time, place and manner restrictions upon the exercise of First Amendment freedoms." Id. at 600. Justice Blackmun reaffirmed the standard for trial closures which he first advanced in *Gannett Co. v. DePasquale,* 443 U.S. 368, 440 (1979) (Blackmun, J., dissenting), i.e., that closure is permissible only when "strictly and inescapably necessary." *Richmond Newspapers, supra,* 448 U.S. at 601, 604 (Blackmun, J., concurring).

Just two years after its watershed decision in *Richmond Newspapers,* this Court held unconstitutional a *mandatory* closure statute, like the ones at issue here. In *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 607 (1982), this Court held that the state interest in "safeguarding the physical and psychological well-being of a minor" does not justify a mandatory court closure rule. The statute in *Globe Newspaper* ordered courtrooms closed during the testimony of minor victims of sexual offenses. The majority opinion is further evidence of the broad purpose served by open proceedings and the scope of the constitutionally-required presumption of openness:

> Underlying the First Amendment right of access to criminal trials is the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs . . . .' By offering such protection, the First Amendment serves to ensure that the individual

> citizen can effectively participate in and contribute to our republican system of self-government . . . . Thus to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one.

Id., 457 U.S. at 604-605 [citations omitted].

Globe Newspaper also stands for the proposition that *mandatory* closure rules, without regard to the circumstances of the particular case, are constitutionally infirm. While finding that Massachusetts' interest in the well-being of minors was indeed compelling, the Court struck down the mandatory closure statute. The Court noted that "it is clear that the circumstances of the particular case may affect the significance of the interest," and held that the First Amendment required determinations regarding closure to be made on a "case-by-case" basis. *Id.*, 457 U.S. at 608.

Subsequent decisions of this Court have confirmed that the reasoning of *Richmond Newspapers* and *Globe Newspaper* applies well beyond criminal trials, and that only particularized findings regarding the need for closure will pass muster under the First Amendment. This Court has held that voir dire proceedings and preliminary hearings are presumptively open to the press and public under the First Amendment, and that they may not be closed except upon the entry of "findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press Enterprise I, supra,* 464 U.S. at 510, and *Press Enterprise II, supra,* 478 U.S. at 13-14.

In determining whether a qualified First Amendment right of access attaches to a particular proceeding, this Court's decisions have emphasized two complementary considerations: "whether the place and process have historically been open to the press and general public" and "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II, supra,* 478 U.S. at 8. These tests of experience and logic point to a qualified First Amendment right of public access to juvenile court proceedings in which juveniles are charged with law violations, especially when, as in this case, those proceedings involve legal arguments on the constitutionality of a state statute.

At the common law, allegations of crimes against juveniles were adjudicated in the same courtrooms in which adult criminal cases were tried. As one commentator has written,

> Our common criminal law did not differentiate between the adult and the minor who had reached the age of criminal responsibility, seven at common law and in some of our states, ten in others, with a chance of escape up to twelve, if lacking in mental and moral maturity. The majesty and dignity of the state demanded vindication for infractions from both alike.... The child was arrested, put into prison, indicted by the grand jury, tried by a petit jury, under all the forms and technicalities of our criminal law, with the aim of ascertaining whether it had done the specific act—nothing else—and if it had, then of visiting the punishment of the state upon it.

Mack, *The Juvenile Court,* 23 Harv. L. Rev. 104, 106 (1909). This Court has previously recognized the "uniform rule of openness" applicable to criminal proceedings at the common law. *Globe Newspaper, supra,* 457 U.S. at 605.

The uniform practice of trying and sentencing juveniles in open, public proceedings apparently continued until 1899, when the State of Illinois created the first state-created juvenile court, and mandated that its records and hearings be closed. Note, *The Public Right of Access to Juvenile Delinquency Hearings,* 81 Mich. L. Rev. 1540, 1547, n. 36 (1983). Proceedings against juveniles were open to the press and general public in Kentucky until 1906. Chapter 64, *Laws of Kentucky* (1906).

Even in the twentieth century, juvenile proceedings have remained open in many jurisdictions. A 1939 study of juvenile court law found that the public was excluded from juvenile proceedings in only 7 states and could be excluded in only 24 more. Jonas, *Press Access to the Juvenile Courtroom: Juvenile Anonymity and the First Amendment,* 17 Colum. J.L. & Soc. Probs. 287, 294-95 (1982). The present situation is still a patchwork. *Id.* Disclosure of court records is discretionary with the judge in most jurisdictions. *In re Gault,* 387 U.S. 1, 24 (1967). In some states, juvenile proceedings are presumptively open, pursuant to state constitutions or statutes. *See, e.g., State ex rel. Oregonian Publishing Company v. Deiz,* 289 Or. 277, 613 P.2d 23 (1980); Fla. Stat. §39.09(1)(c) (1988). Despite the presumptive closure of juvenile proceedings in

other jurisdictions in the twentieth century, it is clear that juveniles charged with law violations were tried in open courts when the First Amendment was adopted and ratified, just as "the historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open." *Richmond Newspapers, supra,* 448 U.S. at 569 (plurality opinion).

The second consideration in determining whether a presumptive right of access exists under the First Amendment is whether public access to juvenile proceedings "plays a significant positive role in the actual functioning of the process." *Press Enterprise II, supra,* 478 U.S. at 11. This Court has recognized numerous benefits accruing from public access to judicial proceedings. Access helps to insure the basic fairness of the proceeding, encouraging all participants to perform their duties conscientiously and discouraging misconduct and abuse of power by judges, prosecutors, and other participants. *Richmond Newspapers, supra,* 448 U.S. at 569 (plurality opinion); *Id.,* 448 U.S. at 596 (Brennan, J., concurring). The importance of public access is particularly important in situations like juvenile court, where no jury is present, because the jury has been "long recognized as 'an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge'." *Press Enterprise II, supra,* 478 U.S. at 12-13, *quoting, Duncan v. Louisiana,* 391 U.S. 145, 156 (1968). Additionally, open proceedings assure ac-

curate fact-finding, by discouraging witnesses from committing perjury and by inducing unknown witnesses to come forward and testify. *Richmond Newspapers, supra,* 448 U.S. at 570, n.8 (plurality opinion).

The same benefits which serve as the foundation for this Court's recognition of a constitutional right of access to criminal trials and pretrial proceedings apply with equal force to juvenile court proceedings involving law violations. Indeed, the increased assurances that an open proceeding will be fair and that fact-finding in such a proceeding will be accurate would appear to be particularly important in juvenile proceedings. As this Court noted in *Kent v. United States,* 383 U.S. 541 (1966), there are indications that juvenile court proceedings are often unfair to the juvenile.

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults. There is much evidence that some juvenile courts, including that of the District of Columbia, lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, as least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.

Id., 383 U.S. at 555-556 (footnotes omitted).

Criticism of juvenile courts has not subsided in the 24 years since *Kent* was decided. In 1971, the Supreme Court of Alaska noted the extensive and fundamental error often found in appealed juvenile cases and openly wondered "whether secrecy is not fostering a judicial attitude of casualness toward the law in children's proceedings." *R.L.R. v. State of Alaska,* 487 P.2d 27, 38 (1971). Experts in the field of juvenile justice have recently concluded that juvenile courts should be open, so the press and the general public "may scrutinize what really goes on in juvenile court." I. Schwartz, *(In) Justice for Juveniles: Rethinking the Best Interest of the Child* 161 (1989). Professor Ira Schwartz, former director of the United States Office of Juvenile Justice and Delinquency Prevention, recently wrote:

> [D]elinquency proceedings should be open to the public and the media. Delinquency proceedings are conducted behind closed doors. This is done, presumably, to maintain confidentiality and to protect juveniles from being stigmatized and labeled by the community. In reality, these private proceedings have done little more than keep the public and the media from being able to monitor and scrutinize what really goes on in juvenile court. In 1986, the Minnesota legislature opened up delinquency hearings for 16- and 17-year olds accused of committing felonies. The opponents of this reform measure predicted that it would have dire consequences for the youth involved. To date, there is no evidence that this change in the law has had any significant adverse impact.

Id. See also, D. Richart and S. Bing, *Fairness is a Kid's Game: Children, Public Policy and Child Advocacy in the United States* 59 (1989) (stating that confidentiality is often used to protect agencies and schools, not the child).

As this Court has recognized, public access also serves to educate the public about the criminal justice process, *Richmond Newspapers, supra,* 448 U.S. at 572-73 (plurality opinion), which is essential to informed citizen debate and decision-making about issues with significant effects beyond the outcome of the particular proceeding. In Kentucky, where juvenile court judges and prosecutors are elected, "[a]ccess to juvenile court hearings would permit the public to evaluate the judge's [and prosecutor's] performance, thus enabling citizens to cast their votes intelligently." Note, *supra,* 81 Mich. L. Rev. at 1550. Public access also fosters an appearance of fairness, thereby heightening public respect for the judicial process. *Globe Newspaper, supra,* 457 U.S. at 606.

Open proceedings also provide a community therapeutic function by allowing the public to see that justice is done. *Richmond Newspapers, supra,* 448 U.S. at 570-572 (plurality opinion).

> When a shocking crime occurs, a community reaction of outrage and public protest often follows . . . . Thereafter, the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are

> frustrated and may manifest themselves in some form of vengeful 'self-help' as indeed they did regularly in the activities of vigilante 'committees' on our frontiers.

Richmond Newspapers v. Virginia, supra, 448 U.S. at 571 [citation omitted]. The therapeutic value of openness is no less important in the case of individuals under the age of 18, who accounted for 20% of all violent crime arrests, 44% of all serious property crime arrests and 39% of overall serious crime arrests in 1979. Note, *supra,* 81 Mich. L. Rev. at 1549-1550, n. 55. In a case involving a "juvenile charged with a heinous crime, the rationale for maintaining open proceedings applies with equal force to any other serious criminal matter." *Orange County Publications v. Dallow,* 14 Med. L. Rptr. 1311, 1314 (N.Y. Sup. Ct. 1987).

The reasoning of this Court in support of a right of access to criminal trials and pretrial proceedings applies to juvenile proceedings in which minors are charged with law violation. Despite the peculiar terminology used in juvenile court, "the reality of ... the Juvenile Court process" is that it may lead a boy charged with misconduct to be "committed to an institution where he may be restrained of liberty for years." *In re Gault, supra,* 387 U.S. at 27. The need for openness in that process, like the need which this Court found in *In re Gault* for procedures which afford due process, is no different than in criminal trials and pretrial proceedings for adults.

Certainly, no feature of juvenile court requires the closure of proceedings which involve the constitution-

ality of a statute and no facts about the juvenile or the offense with which he is charged. The Kentucky Court of Appeals decision closing such proceedings, without any finding that some overriding consideration requires closure or any consideration of alternatives to closure, is in conflict with the prior decisions of this Court.

Since this Court's decision in *Richmond Newspaper,* numerous courts have concluded that the same presumption of openness which attaches to criminal trials and pretrial proceedings also applies to proceedings in juvenile court. In *Associated Press v. Bradshaw,* 410 N.W.2d 577 (S.D. 1987), the South Dakota Supreme Court cited the First Amendment guarantees of free speech and free press, and held that those guarantees must be accommodated when juvenile court proceedings are closed. The South Dakota Supreme Court held that juvenile hearings could only be closed "on a case-by-case basis after consideration of all pertinent factors and all alternatives to closure." *Id.,* 410 N.W.2d at 579, *citing, Globe Newspaper, supra.*

> 'The First Amendment right of access cannot be overcome by the conclusory assertion that the publicity might deprive' the juvenile of his rights or protections . . . . Closure of juvenile proceedings should not occur unless specific supportive findings are made which demonstrate that closure is essential to preserve higher values and the order must be narrowly tailored to serve that interest.

Associated Press, supra, 410 N.W.2d at 580, *quoting, Press Enterprise II, supra,* 478 U.S. at 15.

Other courts have also held that First Amendment interests must be considered before juvenile hearings are closed. In *Taylor v. Indiana,* 438 N.E.2d 275 (Ind. 1982), *cert. denied,* 459 U.S. 1149 (1983), the Indiana Supreme Court noted that Indiana accommodates the competing interests of access and confidentiality by requiring that "care and discernment should mark the Court's approach to the balancing of interests, a matter which inherently requires a case-by-case analysis." *Id.,* 438 N.E.2d at 280.

The Supreme Court of Georgia, while declining to find a *presumption* of openness, has held that First Amendment interests must be considered before juvenile proceedings are closed, noting that a blanket rule that delinquency, deprivation and unruliness hearings *must* be closed would violate the First Amendment. *Florida Publishing Company v. Morgan,* 253 Ga. 467, 322 S.E.2d 233, 238 (Ga. 1984). The Court of Appeals of Ohio has also held that juvenile courtrooms cannot be closed until the court has "conducted an evidentiary hearing and made appropriate findings in accordance with First Amendment rights...." *Ohio ex rel Dispatch Printing Co. v. Petree,* 15 Med. L. Rptr. 2200 (Ohio App. 1988).[4]

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[4]Other courts have held that the constitutionality-required presumption of openness in judicial proceedings does not extend to actions involving juveniles. *See Matter of N.H.B.,* 769 P.2d 844 (Utah App. 1989); *Edward A Sherman Publishing Co. v. Goldberg,* 443 A.2d 1252 (R.I. 1982); and *In re J.S.,* 140 Vt. 458, 438 A.2d 1125 (1981). The presence of conflicting decisions of state courts of last resort is another reason why this Court should grant a writ of certiorari to review the decision of the Kentucky Court of Appeals. Supreme Court Rule 10.1(b).

In this case, the Kentucky Court of Appeals erred in failing to recognize or consider *any* First Amendment interest in open juvenile court proceedings, and in failing to require any findings that closure is essential to preserve higher values which cannot be accommodated under less drastic alternatives to closure. For that reason, this Court should grant a writ of certiorari to review the decision.

B. The Interests Identified By the Kentucky Courts are Insufficient to Require Closure of All Hearings and Records in Juvenile Court.

In the decision which the Kentucky Court of Appeals felt was dispositive in this case, the Kentucky Supreme Court held that "the shroud of secrecy and confidentiality [is] mandated by the above-cited statutes," and quickly dispensed with any argument that the First Amendment in any way limits the scope of the "shroud."

> Excluding the press from these proceedings does not violate or do violence to either the federal or the state constitution. F.T.P.'s right to a fair trial, and the public's interest in fostering opportunities for rehabilitation transcend the right of the press to an instantaneous reporting.

F.T.P. v. Courier-Journal, supra, 774 S.W.2d at 446 (Appendix at 13a).[5] The Court reached that decision without making *any* findings about F.T.P.'s particular case or considering *any* alternatives to closure. The

[5]The Court's statement that the right which the statutes deny to the press is "an *instantaneous* reporting" is baffling. Under the Kentucky Supreme Court's decision, juvenile court records and hearings are mandatorily and *perpetually* sealed.

result is a decision squarely in conflict with *Richmond Newspapers* and its progeny.

This Court's decisions make clear that the presumption of openness may be overcome only where closure is absolutely necessary to preserve higher interests.

> [T]he presumption may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Press-Enterprise I, supra, 464 U.S. at 510. The interests cited by the Kentucky Supreme Court are insufficient to justify a mandatory closure statute.

Closure of judicial proceedings to ensure a fair trial, which the Kentucky Supreme Court stated was the purpose of the statutes, is nonsensical, in light of this Court's frequent pronouncements that *openness* helps to assure the basic fairness of judicial proceedings. *Richmond Newspapers, supra,* 448 U.S. at 569 (plurality opinion). Mandatory closure to protect the confidentiality of juvenile offenders, assertedly "fostering opportunities for rehabilitation", *F.T.P. v. Courier-Journal, supra,* 784 S.W.2d at 447 (Appendix at 13a), is also unjustified. As this Court recognized in *Davis v. Alaska,* 415 U.S. 308 (1974), "[t]he State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding" of a vital constitutional right. *Id.,* 415 U.S. at 320. In *Davis,*

this Court held that the interest in confidentiality must yield to a defendant's Sixth Amendment right to confront witnesses. In this case, the asserted interest in confidentiality must yield to the public's First Amendment right to observe judicial proceedings.

That result is particularly appropriate where, as here, no particularized findings were made regarding *any* alleged rights which would be damaged in any way by the release of the tapes or transcripts of the legal arguments on the constitutionality question. In fact, the juvenile court said nothing about the issue and the circuit court blindly applied what it construed as the *requirement* of Ky. Rev. Stat. 610.340(1) to deny access to the argument. In the decision relied upon by the Court of Appeals, the Kentucky Supreme Court cited "the shroud of secrecy and confidentiality *mandated* by the above-cited statutes. . . ." *F.T.P. v. Courier-Journal, supra,* 774 S.W.2d at 446 (emphasis added) (Appendix at 12a). A majority of the Court of Appeals felt that the Kentucky Supreme Court's decision was dispositive, if questionable. The result is a decision in which closure is mandated, without regard to the need for closure in a particular case, or available alternatives to it.

Globe Newspaper demonstrates that even compelling state interests simply cannot justify a *mandatory* closure rule, like the closure rule enunciated by the Kentucky courts.

> We agree with appellee that the first interest—safeguarding the physical and psychological well-being of a minor—is a compelling one. But as

> compelling as that interest is, it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim. Among the factors to be weighed are the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interest of parents and relatives. Section 16A, in contrast, requires closure even if the victim does not seek the exclusion of the press and general public, and would not suffer injury by their presence.

Globe Newspaper, supra, 457 U.S. at 607-608 (emphasis in original) (footnotes omitted). This Court noted that "the names of the minor victims were already in the public record," indicating that closure might not be necessary. *Globe Newspaper, supra,* 457 U.S. at 608. In this case, of course, F.T.P.'s name and the offense with which he is charged are also widely known, as his counsel has admitted.

Any balancing of The Courier-Journal's rights with the alleged interest in the confidentiality of the proceedings in the instant action—balancing *required* by the First Amendment—would have necessarily resulted in a conclusion that the legal arguments on the constitutionality of the transfer statute must be made available to the press and the general public. The public's interest in arguments regarding the enforceability of statutes passed by its elected representatives is obviously strong. On the other hand, F.T.P.'s interest in closed proceedings after the wide dissemination

of his name and the nature of the offense with which he is charged is weak, especially in view of the fact that The Courier-Journal is seeking access to only the legal arguments concerning the constitutionality of the transfer statute and not the facts of F.T.P.'s case. Under those circumstances, the constitutional interest in open proceedings outweighs any conceivable interest in closing those legal arguments.

The Kentucky Court of Appeals decision precluded any consideration of the First Amendment issue, based on the Kentucky Supreme Court's holding that the statutorily-mandated closure "does not violate or do violence to either the federal or the state constitution." *Courier-Journal v. F.T.P., supra* (Appendix at 13a). That decision was wrong, for the same reason that this Court held Massachusetts' mandatory closure statute unconstitutional in *Globe Newspaper:*

> In short, §16A cannot be viewed as a narrowly tailored means of accommodating the State's asserted interest: That interest could be served just as well by requiring the trial court to determine whether the State's legitimate concern for the well-being of the minor victim necessitates closure. Such an approach ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest.

Globe Newspaper, supra, 457 U.S. at 609. Because Ky. Rev. Stat. 610.070(3) and 610.340(1), as interpreted by the Kentucky courts, "cannot be viewed as a narrowly tailored means of accommodating the state's asserted interest," *Globe Newspaper, supra,* 457 U.S.

at 609, this Court should issue a writ of certiorari to review the decision of the Kentucky Court of Appeals.

CONCLUSION

This Court has previously determined that the First Amendment to the United States Constitution mandates a presumption of openness in criminal trials and pretrial proceedings. Kentucky has refused to follow that principle in cases in which individuals under the age of 18 are charged with acts which would constitute a crime if committed by an adult. In fact, Kentucky's courts have turned the presumption of openness on its head by holding that such proceedings are covered by a "shroud of secrecy and confidentiality *mandated* by" statute. *F.T.P. v. Courier-Journal, supra,* 774 S.W.2d at 446 (emphasis added) (Appendix at 12a).

There is simply no reason why proceedings which the Constitution would require be presumptively open if the accused was an 18-year-old can be mandatorily closed when the accused is 17. Just as "[u]nder our Constitution, the condition of being a boy does not justify a kangaroo court," *In re Gault, supra,* 387 U.S. at 28, the condition of being a boy does not justify an adjudication under a mandatory "shroud of secrecy and confidentiality." Because the decision of the Kentucky courts is in conflict with the First Amendment principles this Court has set forth regarding access to criminal proceedings, Petitioners, Courier-Journal and Louisville Times Company and Kay Stewart, respectfully urge this Court to grant this petition for a writ of certiorari to the Court of Appeals of Kentucky.

Respectfully submitted,

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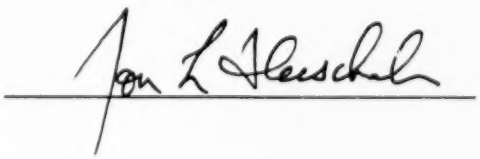
CERTIFICATE OF SERVICE

It is hereby certified that three copies of the foregoing have been served by mail, postage prepaid, upon J. David Niehaus, Deputy Appellate Defender of the Jefferson District Public Defender, 200 Civic Plaza, 179 West Jefferson Street, Louisville, Kentucky 40202, counsel for F.T.P.; and Greg Holmes, Office of the Attorney General, Capitol Building, Frankfort, Kentucky 40601, counsel for Honorable Robert E. Delahanty, this 14 day of July, 1990.



APPENDIX

RENDERED: OCTOBER 27, 1989; 10:00 A.M.
TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

88-CA-1489-MR

COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY and
KAY STEWART - - - - - - - *Appellants*

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE REBECCA WESTERFIELD, JUDGE
ACTION NO. 88-CI-2609

F.T.P., the Real Party in Interest, and
HONORABLE ROBERT E. DELAHANTY, Jefferson
District Court Judge - - - - *Appellees*

AND

88-CA-1490-MR*

COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY and
KAY STEWART - - - - - - *Cross-Appellants*

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE REBECCA WESTERFIELD, JUDGE
ACTION NO. 88-CI-2609

F.T.P., the Real Party in Interest, and
HONORABLE ROBERT E. DELAHANTY, Jefferson
District Court Judge - - - *Cross-Appellee*

---

* F.T.P. filed an appeal against the Courier-Journal (88-CA-1422-MR). The Courier-Journal filed an appeal (88-CA-1489-MR) and a cross-appeal (88-CA-1490-MR). This Court granted F.T.P.'s motion to dismiss 88-CA-1422-MR and consolidated appeal number 88-CA-1489-MR and cross-appeal number 88-CA-1490-MR. The consolidated appeal is the matter before us here.

AFFIRMING

Before: HOWERTON, Chief Judge, HAYES and WEST, Judges.

HOWERTON, Chief Judge. The Courier-Journal and Louisville Times and Kay Stewart appeal from an order of the Jefferson Circuit Court denying their request for tapes or other information relating to oral arguments in the district court on the issue of the constitutionality of certain provisions of the juvenile code. The court reasoned that to order disclosure of the closed hearing "would require a declaration that KRS 610.340(1) is unconstitutional. . . ." The statute provides that "all juvenile court records . . . generated pursuant to KRS Chapters 600 to 645 . . . shall not be disclosed except to the child or parent unless ordered by the court for good cause. . . ." The circuit court avoided deciding the constitutional issue, but concluded that to make an exception permitting access to legal arguments in juvenile proceedings is simply unworkable.

The appellants raise the constitutional question before this Court in two ways. The first argument, which uses Sections 8, 11, and 14 of the Kentucky Constitution, is quite persuasive. Although we did not allow for its full development, if carried to its logical conclusion, the concept of any closed juvenile proceedings could be in jeopardy.

The second argument focuses more on the fact that juvenile proceedings are judicial and the statutes requiring closed hearings are legislative enactments. As such, the statutes violate Sections 27 and 28 of the Kentucky Constitution concerning the separation of powers.

Regardless of these arguments, the Kentucky Supreme Court finalized *F.T.P., an unnamed Child v. Courier-Journal,* Ky., 774 S.W.2d 444 (1989), on September 7, 1989. While our appeal considered the question of access to juvenile proceedings in the district or juvenile court, the Supreme Court case involved the question of access to records of juvenile proceedings on appeal to a circuit court.

Although our specific questions were not addressed by the Supreme Court decision, a majority on this panel nevertheless concludes that the Supreme Court's opinion is dispositive. It reads in part:

> Excluding the press from these proceedings does not violate or do violence to either the federal or the state constitution. F.T.P.'s right to a fair trial, and the public's interest in fostering opportunities for rehabilitation transcend the right of the press to an instantaneous reporting.
>
> . . . All judicial tribunals will remain closed to the press and the public unless and until F.T.P.'s status is changed.

774 S.W.2d at 446.

We would urge the Supreme Court to grant a petition for review, if one is requested in this case, and to consider the constitutional questions with the benefit of briefs and arguments. We also point the Supreme Court's attention to the reasoning in the dissent filed herein by Judge Hayes.

The order of the Jefferson Circuit Court is affirmed.

WEST, JUDGE, CONCURS; HAYES, JUDGE, DISSENTS BY SEPARATE OPINION.

HAYES, JUDGE, DISSENTING: There is no constitutional prohibition I am aware of that prohibits juveniles from being treated any differently than adults by the criminal justice system. In fact, it was not until the early 1900's, long after the adoption of the United States Constitution and the present Kentucky Constitution, that a separate system existed, by statute, for juveniles.

The Kentucky statute in question here is KRS 610.070(3). That statute was copied, with some minor changes which are not important here, from the Model Juvenile Court Act (U.L.A.) §24. By permitting the juvenile court judge to admit to these closed hearings "such persons as the judge shall find has a direct interest in the case or in the work of the Court," the Kentucky Legislature has left the door open for the press and the public to

enter. It is assumed the legislature was well aware of the official commentary to §24 of the Model Act when KRS 610.070(3) was enacted. That commentary states:

> The section as drawn permits the court in its discretion to admit news reporters. This is frequently done with the understanding that the identity of the cases observed will not be published, a procedure generally satisfactory to the news media.

Therefore, there is no law in Kentucky that requires mandatory closure of juvenile proceedings to the press and public as appellee argues KRS 610.070(3) does. However, that is not to say the judge is prohibited from closing the proceedings in a particular case. What is required of the court before he/she closes the proceedings?

The constitutional right of the press to access, that is its right to be present and gather the news, as opposed to the already determined unconstitutional prior restraint on the press, that is news already gathered and the desire to publish, is of recent origin. The United States Supreme Court in *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980), determined for the first time that the First and Fourteenth Amendments to the United States Constitution prohibited the denial of the press and public a right of access to adult criminal trials absent an overriding governmental interest articulated in specific findings by the trial court even though, as was the case in *Richmond,* the closure is by agreement of the defendant, prosecution and trial court.

The *Richmond* case was not a juvenile proceeding but was the fourth trial of an adult for murder. Research reveals no United States Supreme Court cases involving juvenile proceedings in the context of the right of access. However, *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 73 L.Ed.2d 248, 102 S.Ct. 2613 (1982), a right of access case, did involve a juvenile victim of rape as a witness in an adult criminal trial. The holding was that a state statute compelling exclusion of the press and public from the courtroom during the testimony of the juvenile

victim was unconstitutional. It is interesting to note the court stated that the compelling state interest, that of protecting the minor victim from further physical and psychological harm, as compelling as that interest is, did not justify a *mandatory* closure rule. The suggestion was, as it is here, that "the circumstances of the particular case may effect the significance of the interest." *Globe,* 73 L.Ed.2d at 248, 258. Therefore, the trial court should determine on a case-by-case basis whether closure is necessary.

I interpret *Globe* to stand for the proposition that *any* mandatory rule denying access of the press to the people's courtroom without particularity determinations in individual cases is constitutionally prohibited. Therefore, if as argued by the appellee, KRS 610.020(3) is a mandatory bar of access in all cases, I am prepared to say it is unconstitutional as violating the press's First Amendment right of access.

As stated above, however, I believe KRS 610.070(3) is not a mandatory closure rule. It is discretionary with the trial court whether to permit the press. But I believe it is clear from the above cases, even though not specifically involving juvenile offenders in a juvenile proceeding, that before a court can close the proceedings to the public and press there is to be some indication, articulated in a specific finding, that some discretion by the trial court has in fact been exercised. I perceive no greater governmental interest in protecting from publication a juvenile offender charged with rape, as KRS 610.070(3) appears to do absolutely, than the governmental interest in protecting a juvenile victim of a rape from the trauma of a public trial.

It would appear that, especially in cases where juveniles are charged with offenses that if committed by adults would be felonies, it would be in the best interest of the public and the juvenile justice system to open some of the juvenile court proceedings.

A Wisconsin court stated it clearly:

> One of the reasons why our courts are looked upon by the public with distrust and confusion is precisely because of the lack of public awareness of the court's day-to-day work. Very rarely is a juvenile case a matter of black and white. The press had a duty and a responsibility to report the shades of gray with which our courts must work. If the press is in the courtroom and does not unduly overstep its bounds by unnecessarily causing embarrassment to the children and their families, the press can see and hear the court's work. The results are twofold. First, there will be less misunderstanding of the difficult decisions juvenile court judges are called upon to make. *We believe that the legislature did not intend to exclude from the courtroom dedicated and fair journalists determined to relate difficult information in a way that makes this vital intelligence accessible to the general public.* Second, the public will be better informed on how the judicial power is being exercised in juvenile courts. As a result, on election day, the public will be better able to make an educated decision in electing the judiciary (Emphasis theirs). *State, ex rel. E.R. v. Flynn,* 276 N.W.2d 313, 318 (Wis. App. 1979).

The record does not indicate the exercise of any discretion by the juvenile court judge in determining the appellants were not entitled to access to the hearing requested by appellants, and absent a hearing where the appellant can be heard, this case must be reversed. However, I do not believe the holding could or should be confined to the narrow issue of whether the press should have been granted access to a hearing on a constitutional question, but absent a hearing and an overriding interest articulated in findings by the trial judge, all proceedings in juvenile court should be open.

Since the issue before us deals with the constitutionality of mandatory closure under KRS 610.070(3), the Kentucky Supreme Court case involving these same parties,

held to be dispositive by the majority, is not applicable as that particular issue was not before them.

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SUPREME COURT OF KENTUCKY

89-SC-874-D
(88-CA-1489-MR & 88-CA-1490-MR)

COURIER-JOURNAL & LOUISVILLE TIMES COMPANY, ET AL. - - - - - *Movants*

v.

Jefferson Circuit Court
88-CI-2609

F.T.P., THE REAL PARTY IN INTEREST, ET AL. - *Respondents*

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

The opinion of the Court of Appeals is ordered not to be published.

ENTERED April 18, 1990.

/s/ Robert F. Stephens
Chief Justice

RENDERED: JUNE 8, 1989
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

89-SC-103-MR

F.T.P., an Unnamed Child (Real Party in Interest) - - - - - - - - - *Appellant*

ON REVIEW FROM COURT OF APPEALS
v. **NO. 88-CA-2190-OA**
(JEFFERSON CIRCUIT COURT NO. 88XX0051)

COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY,
KAY STEWART,
CARY WILLIS and
MARTIN E. JOHNSTONE, JUDGE, JEFFERSON CIRCUIT COURT - - - - - - - - - *Appellees*

AND

89-SC-126-MR

COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY,
KAY STEWART and
CARY WILLIS - - - - - - - - - *Cross-Appellants*

ON REVIEW FROM COURT OF APPEALS
v. **NO. 88-CA-2190-OA**
(JEFFERSON CIRCUIT COURT NO. 88XX0051)

F.T.P. an Unnamed Child (Real Party in Interest), and
MARTIN E. JOHNSTONE, Judge, Jefferson Circuit Court - - - - - - - - - *Cross-Appellees*

OPINION OF THE COURT BY JUSTICE COMBS AFFIRMING IN PART/REVERSING IN PART

F.T.P., an unnamed juvenile, appeals from so much of an opinion and order of the Court of Appeals permitting appellees/cross-appellants to attend and report juvenile proceedings at the appellate level. Appellees/cross-appellants appeal from so much of the same opinion and order denying them access to his juvenile court records.

F.T.P. faces charges in the Juvenile Session, Jefferson County District Court. At the time of the alleged offense he was under the care, custody and control of the Cabinet for Human Resources. The present controversy arose when the Commonwealth sought to transfer the case to the Jefferson Circuit Court, for trial of F.T.P. as a youthful offender. This prompted the juvenile's attorney to challenge the constitutionality of the transfer statute, KRS 640.010. On January 22, 1988, the district court entered an order declaring the transfer statute unconstitutional due to vagueness because the statute failed to set forth appropriate standards for the making of a transfer determination.

After the Commonwealth appealed this order to Jefferson Circuit Court, Kay Stewart, one of the Courier's staff writers, requested access to the court file. Her request was denied because an order had previously been entered sealing the record. On April 21st the Courier filed motions to intervene and for access to the records. After a hearing Judge Martin E. Johnstone of the Jefferson Circuit Court entered an order permitting the intervention but denying access to the record.

On September 26th Cary Willis, another staff writer, was present at a hearing on the appeal in circuit court. At that time counsel for F.T.P. requested the court to close the proceeding to both the press and public. A hearing on this motion was held on September 30th before Judge Johnstone. On October 7th the court entered an order denying the Courier and its reporters access to the appeal hearings.

The court based its rulings upon provisions of KRS 610.070(3) and 610.340(1), which are as follows:

KRS 610.070(3)

> The general public shall be excluded and only the immediate families or guardians of the parties before the court, witnesses necessary for the prosecution and

> defense of the case, the probation worker with direct interest in the case, such persons admitted as the judge shall find have a direct interest in the case or in the work of the court, and such other persons as agreed to by the child and his attorney may be admitted to the hearing. Witnesses shall be admitted to the hearing only for the duration of their testimony.
>
> KRS 610.340(1)
>
> Unless a specific provision of KRS Chapters 600 to 645 specifies otherwise, all juvenile court records of any nature generated pursuant to KRS Chapters 600 to 645 by any agency or instrumentality, public or private, shall be deemed to be confidential and shall not be disclosed except to the child or parent unless ordered by the court for good cause.

It is the paper's contention that the first amendment to the United States Constitution, and Section 8 of Kentucky's Constitution as well as the common law rule gives it a right to be present at these hearings. The Courier did not challenge the constitutionality of the closure statutes, 610.070(3) and 610.340.

It was and is the Courier's contention that KRS 600.020(12) defines "court" to mean only the juvenile session of the district court, and that since the matter was on appeal to the Jefferson Circuit Court the statutes were inapplicable. In discussing this phase of the case we would like to point out that the opening words of KRS 600.020 make the definition conditional:

> As used in KRS Chapter 600 to 645, *unless* the context requires otherwise:
>
> . . . .
>
> (12) "Court" means the juvenile session of the district court, ... (emphasis added).

On October 10, 1988, the Courier filed an original action in the Court of Appeals seeking to prohibit Judge Johnstone from enforcing his order closing the proceedings concerning the juvenile.

On February 3, 1988, the Court of Appeals issued a Writ prohibiting Judge Johnstone from excluding the Courier from hearings in this case and from closing the circuit court record. The concluding paragraph of the opinion and order of the court is as follows:

> Therefore, the respondent is hereby prohibited from closing to the petitioners any hearings in the subject appeal now pending before him and from closing to them so much of the record on appeal even [sic] *as does not consist of the juvenile court record* (emphasis added).

The purpose of the shroud of secrecy and confidentiality mandated by the above cited statutes is to protect the juvenile. Clearly this purpose was uppermost in the minds of the General Assembly. It was intended that trials of juveniles not be publicized in the news media, as such publicity would possibly deprive the juvenile of a fair trial and, more particularly, would likely diminish his or her prospect for rehabilitation. To exclude the press at the district level, but admit them at the appellate level would tend to nullify the original intent and purpose of the legislature and the wholesome policy of the Uniform Juvenile Act.

F.T.P. is still a juvenile and still entitled to protection of the Act. The transfer hearing has not as yet been concluded. It may be that this case will ultimately be transferred to the circuit court for trial. If and when that occurs F.T.P. will then be stripped of the protection afforded by these statutes and will be treated as an adult, but until that happens we must comply with the law as written by our General Assembly and exclude the public

and press from all proceedings, both at the district and appellate levels.

Analyzing KRS 600.020(12) in the light of Section 115 of our constitution which guarantees to all citizens including all juveniles at least one appeal, and when considering it in the light of the above mentioned statutes, we conclude that the context requires a construction other than that made by the Court of Appeals and urged by the Courier.

Excluding the press from these proceedings does not violate or do violence to either the federal or the state constitution. F.T.P.'s right to a fair trial, and the public's interest in fostering opportunities for rehabilitation transcend the right of the press to an instantaneous reporting.

For the foregoing reasons, the action of the Court of Appeals is affirmed in part and reversed in part. All judicial tribunals will remain closed to the press and the public unless and until F.T.P.'s status is changed.

Stephens, C.J., Gant, Lambert, and Vance, JJ., concur.

Leibson, J., concurs in part, dissents in part by separate opinion in which Wintersheimer, J., joins.

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CONCURRING IN PART/DISSENTING IN PART BY JUSTICE LEIBSON

The constitutionality of the new juvenile transfer statute, KRS 640.010, is a matter of public importance, and the public and news media should have access to the appellate court proceedings regarding same except to the extent necessary to protect the juvenile as contemplated by KRS 610.070 and KRS 610.340. These confidentiality limitations should be understood in the context of KRS 600.020(12), which limits the term "court" as used in these statutes to the "juvenile session of district court."

Because this juvenile's case is still pending in the juvenile session of the district court, F.T.P. is entitled to the statutory protection in KRS 610.070 and KRS 610.340, but limited to the factual material pertaining to the juvenile in the record and evidence developed in Juvenile Court. To the extent this factual material is referred to or discussed in the circuit court appeal, confidentiality should be afforded. Beyond that point statutory confidentiality is not afforded, and should not be provided.

My interpretation of the decision of the Court of Appeals is that it is consistent with the position thus stated. Therefore, I would affirm the Court of Appeals.

Wintersheimer, J., joins.